Feminist Jurisprudence: An Evolution from Fixed Mindset to A Growing Mindset

Pranav Raina
Assistant Professor & Division Chair, School of Law, Galgotias University, Greater Noida

Shreya Solenkey
4th Year BBA LLB (Hons.) from School of Law, Galgotias University, Greater Noida

Abstract:

Feminist Jurisprudence includes the study of different strands of feminist theory and the themes that have emerged and developed within feminist thought, as well as the application of theory to issues that interest members of class. It is the law’s neutrality as the very mechanism that perpetuates injustices against woman. Feminists embrace a view that attempts to challenge the existing legal status by focusing on what kind of institutions and laws would be necessary to redress the imbalance against woman in society. It is the very core of our society that the feminist jurists question. They argue that we must look at the norms embedded in our legal system and rethink the law. What is "equality" or an "injury" in light of broader understandings of those norms?

1. Introduction

Feminism is a set of movement seeking gender equality, a movement to change social, political and economic rights such as equal wage and the right to access to health and education, and equal political rights. In India some of the prevalent issues which are to be curbed by feminism are issues related to employment, globalization, education, sex-select abortion etc. Despite its efforts, feminism in India is criticized as the movement has special focus on women who are already privileged and the needs of lower caste women are neglected.

2. Feminist Jurisprudence

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Feminist Jurisprudence helps to points out that what is neutral or natural for one person is a distortion for another person. Pregnancy, child rearing and other caregiving activities are still treated in the workplace as peculiar occurrences, rather than what they are: commonplace functions that serve the larger good.72

The pervasive influence of patriarchy on legal structures, demonstrates its effects on the material condition of women and girls, and develops reforms to correct gender injustice, exploitation, or restriction73

Promoting freedom and equality for women reflects a profound shift in basic assumptions about the nature of women and their proper place in the world: a shift from inequality to equality of the sexes, along with re-examination of what equality itself requires.

3. Origin and Historical Background of Feminism and Feminist Jurisprudence

In India, basically there were three phases of feminism. Unlike the western world, the feminist movement in India was actually initiated by men. The efforts of the men lead to abolishment of Sati practice in India. It was meant for the upliftment of women so that they can join forces with others in the freedom struggle. Post-independence as the Constitution of India guaranteed Equality between sexes, there was not much of an uproar about equality as the roles, functions, aims and desire of women were different. With the increase of globalization and the concept of personal rights, feminism has taken a new shape in India. It is further explained as-

1850-1915
The colonial venture into modernity brought concepts of democracy, equality and individual rights. The rise of the concept of nationalism and introspection of discriminatory practices brought about social reform movements related to caste and gender relations. The first phase was able to uproot practices such as Sati and remarriage of widows, forbid child marriage, reduce illiteracy etc. However, efforts for improving the status of women in Indian society were somewhat thwarted by the late nineteenth century, as nationalist movements emerged in India. These movements resisted 'colonial interventions in gender relations' particularly in the areas of family relations. In the mid to late nineteenth century, there was a national form of resistance to any colonial efforts made to 'modernize' the Hindu family.74

1915-1947
The second stage nationalism became the pre-eminent cause. Gandhi legitimized and expanded Indian women's public activities by initiating them into the non-violent civil disobedience movement against the British Raj. He exalted their

72 Id.
74 Gangoli (2007), pages 88–89.
feminine roles of caring, self-abnegation, sacrifice and tolerance; and carved a niche for those in the public arena. Also, national level organizations such as All India Women Conference (AIWC) and the National Federation of Indian Women (NFIW) came up in the second phase. These organizations aimed at issues relating to women’s political rights, leadership and roles in parties etc.

POST INDEPENDENCE
Prior to independence the women in India did not question the societal status of women. They did not question the various roles that were especially made for women. This change was seen after independence with the increase of westernization. The opportunities were demanded for both the genders. The state of Kerela in this regard is much advanced as compared to other states. This state has the highest literacy rates and traditionally, before amendment in the Hindu Law, it was a common practice to give daughters and wives a portion of the property.

FRENCH REVELOUTION
It is one of the most important revolutions in the world. A unique feature of this revolution is the influence of women. The position of woman within the context of the French Revolution, and political liberalism, e.g., Divorce and Inheritance Laws. Liberty. One such example is the historical Women’s March on Versailles, on 5 October 1789 crowds of women began to assemble at Parisian markets. The women first marched to the Hôtel de Ville, demanding that city officials address their concerns. The women were responding to the harsh economic situations they faced, especially bread shortages. They also demanded an end to royal efforts to block the National Assembly, and for the King and his administration to move to Paris as a sign of good faith in addressing the widespread poverty.

4. Feminist Jurisprudence and Other Disciplines
Feminist writers criticize the inherent methodological framework used by such legal positivists as Austin, Hart and Kelsen. As such, traditional command theorist like John Austin, for example, are questioned for their narrow framework of command, obedience, and sanction as the essence of the law. Theory of Legal Positivism and Rule of Law is also criticized by feminist jurists.
Contemporary feminist philosophy of law also draws from diverse scholarly perspectives such as international human rights theory, postcolonial theory, critical legal studies, critical race theory, queer theory, and disability studies.
The view of various jurists are taken into consideration. Each of them have their argument against the current system, they are as under: -

1. Carole Pateman argue that, “traditional jurisprudence treats citizenship as patriarchal constructed in the masculine image”.
   “The story of the original contract shows how sexual difference gives rise to a patriarchal division of labour, not only in the conjugal home between the (house) wife and her husband, but in the workplaces of civil society.”

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2. Catherine MacKinnon sees maleness as the organizing form of what is accepted as “normal.” MacKinnon is very critical of most forms of equality legislation for being vehicles of making woman as men, rather than searching for true equality. “Seeing sex equality questions as matters of reasonable or unreasonable classification is part of the way male dominance is expressed in law. If you follow my shift in perspective from gender as difference to gender as dominance, gender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect. The difference approach tries to map reality; the dominance approach tries to challenge and change it. In the dominance approach, sex discrimination stops being a question of morality and start being a question of politics.”

MacKinnon’s ideas have been influential. She is credited with developing the now orthodox idea that sexual harassment in the workplace is a form of discrimination. Until the latter half of the ‘70s, sexual harassment on the job was not considered an actionable injury to women, and several national studies showed that it was very common.

3. Carol Gilligan, a social scientist who sparked much of the thinking that we refer to as Feminist Jurisprudence. Gilligan wondered why girls and women consistently scored lower than boys and men on tests for moral development. She found that the scales for measuring moral development were developed by men researchers using male subjects.

4. Margot Stubbs, sees feminist jurisprudence as transcending the positivist conceptual framework of both liberal legalism (e.g., the rule of law) and Marxist (e.g., law as reflection of the bourgeoisie class that is the capitalist superstructure). Feminist jurisprudence seeks to make the connection between Hilarie Barnett’s “woman question” and “the law”.

5. John Rawl’s “Theory of Justice,” in 1972. Essentially, Rawl’s postulates abstraction to ‘pure reason’ in man’s original state, where participants are ignorant of their self-interest, desires, etc. Rawls calls this a “veil of ignorance”. Only by stripping people of their individuality, according to Hilare Barnett (“On Feminist Jurisprudence”), does Rawls consider the principles on which society and laws should be based. Yet writers such as Mari Matuda criticize Rawls for avoiding real earthly issues.

6. The Father, the Son and the Holy Ghost” are completely in the image of man. Perhaps there is hope yet, since the ghost may yet be a woman! Recent writings such as “Woman in the Bible”, “Who wrote the Gospels” and others, have argued that the Catholic Church’s attempt to completely dishonor and discredit Mary Madeline as not only Jesus’ Wife, but as a woman with extraordinary intellect and commercial savvy. It was Mary, not the other disciples, who first saw Jesus upon his resurrection. The male dominated church has done everything in its power to remove Mary from their religious texts and condemn her as a whore to scorn into eternity.

77 Ibid page 5
79 Id.
80 Id.
5. Feminism and Feminist Jurisprudence in India

Feminism in India is a set of movements aimed at defining, establishing, and defending equal political, economic, and social rights and equal opportunities for Indian women. It is the pursuit of women's rights within the society of India. Feminism can also be understood by way of religions.

HINDU FEMINISM

In the Hindu religion, there has been partial success in terms of gender equality reform laws and family law. While this is a major advancement relative to other religions in India, it is still not a complete triumph in terms of feminism and relieving oppression.83

Due to various castes in the Hindu religion, the struggle for feminism has converted into a struggle for equality of castes. It has been seen that women from a higher caste seen to benefit more from feminism than the lower caste women.

ISLAMIC FEMINISM

A table turning event was witnessed as a win for feminism in the historical judgment of Shah Banos’s case84. Shah Bano, a 73-year-old Muslim woman, was divorced by her husband after forty-three years of marriage. According to the Sharia or Muslim Law, her husband was not required to pay her alimony. Shah Bano challenged this decision in the Supreme Court, which ultimately ruled in her favor and ordered her husband to pay her a monthly maintenance allowance. This caused chaos amongst the Muslim clerics who denounced the judgments and suggested that their religion, Islam was under attack in the country.

6. Obstacles Today Against Feminist Jurisprudence

There are still many obstacles that are to be dealt with by feminist jurisprudence. Some of them are discussed further.

Traditional Jurisprudence

Recurring dichotomies that affect women: public/private, agent/victim, motherhood/sexuality, production/reproduction, nurture/work85. In short, is not so much that woman have been in a “radically different” relation to the law compared to men, but rather, feminist jurisprudence concentrates on the inherent inequities fostered by the methodology of traditional jurisprudence, in particular, legal positivism. Feminists see the law as the prime source for perpetuating pre-existing gender based inequities, especially within the framework of capitalism.86

Traditional jurisprudence thus emphasizes the “rule of law”, not of men. Men are arbitrary and inconsistent, whilst the “rule of law” could be viewed as a universal, a contextual standard that could be blindly applied to all society in whatever

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83 Narain, Vrinda. Reclaiming the nation: Muslim women and the law in India. Toronto [Ont.]: University of Toronto, 2008.
84 1985 SCR (3) 844
85 Feminist Jurisprudence (Law 815-001 A and B) Fall 2010 Professor Ann Shalleck
86 Jurisprudence Lecture Feminist Jurisprudence February 2006 George D. Pappas, Esq. International Center for Legal Studies
Law’s neutrality as the very mechanism that perpetuates injustices against woman. Feminist writers criticize the inherent methodological framework used by such legal positivists as Austin, Hart and Kelsen. As such, traditional command theorist like John Austin, for example, are questioned for their narrow framework of command, obedience, and sanction as the essence of the law. Feminist writers are also critical of legal positivism for its reliance on discovering law’s nature as the key to understanding law.

**Legal Positivism**

Legal positivism is fundamental to the constitution of legal thought. It is a key reason why lawyers come to accept the official version of law as legal theory, why lawyers tend not to question the nature and purpose of law but take it as a given. It also helps to explain why the law comes to assume the status of objectivity and why judges become the seekers of truth.

Understand that simply asking for “equality” of rights is not necessarily the answer, and actually perpetuates a legal system that is already embedded with male dominated assumptions to find solutions for woman.

**Marriage**

In Indian culture, most of the average Indian woman's life is spent in marriage; many women are still married before the legal age of 18, and the incidence of non-marriage is low in India. Childbearing and raising children are the priorities of early adulthood for Indian women. Thus, if they enter the workforce at all, it is far later than Indian men. Urban Indian men reach the peak of their labor force participation between the ages of 25 and 29, while urban Indian women do so between the ages of 40 and 44. This discourages women to acquire any sort of skills and earn for themselves.

7. **Changes Made by Feminist Jurisprudence in India**


These Acts are significant proof that feminism exists in India and there are several instances and amendments made for benefit of women. Hindu Law of Inheritance for women have been changed in 2005 Amendment. The apex court judgment has now added another disqualification for women regarding their right of inheritance. Until now, they could not ask for a share if the property had been alienated or partitioned before December 20, 2004, the date the Bill was introduced. This
judgment makes it imperative for the father to have been alive when the amendment came into force.91

All that is required is that the daughter should be alive and her father should also be alive on the date of the amendment,” it said. The court also held that alienation of ancestral property, including its partition, which may have taken place before December 20, 2004, in accordance with the law applicable at that time, would remain unaffected by the 2005 amendment, and those partitions can no longer be reopened by daughters. 92

Besides these changes there can be a significant impact seen on employment. Indian women were contributing nearly 36 percent of total employment in agriculture and related activities, nearly 19 percent in the service sector, and nearly 12.5 in the industry sector as of the year 2000. There has been a significant change in the participation of women at schools, this shows an increase in the number of women who are getting educated.

Certain western judgments empowering women such as In Ellison v. Brady93 the U.S. Court of Appeals for the Ninth Circuit reversed a ruling that a man's behavior toward a woman co-worker was "trivial" and found that women could have found the behavior frightening.94 General Electric Co. v. Gilbert95 the Supreme Court reasoned that excluding pregnant women from medical benefits' was a gender neutral practice, because non pregnant women were not affected.96 McCourteney v. Imprimis Technology, Inc.97 the court acknowledged that it may not always be possible to keep care-giving responsibilities at home separate from the workplace. The judges decided that a woman who was fired for missing too much work to care for a chronically sick baby had not shown a lack of concern for her job and was eligible for unemployment insurance.98

8. Conclusion

Feminist Jurisprudence is a fight against traditional law which are mostly patriarchal in nature. One wonders what changes could have possibly occurred had the feminine view was taken in framing of laws. This project compared the concept of Feminist Jurisprudence with other disciplines as it cannot be understood in isolation. It aims at celebrating some milestones achieved by a change in law due to Feminist Jurisprudence globally and in India. This project aims to study the radical change in mindset of people due to feminism and whether they are accepting this change.


92Id.

93924 F. 2d [1991]),


95 429 U.S. 125 [1976])


97 465 N.W. 2d 721 [1991]),

The various stages of development of feminism in India is seen from 1915 to Independence and after. There has been a major change in the ideas and role of women in the society. Earlier, women did not question their roles in society but with the increase in influence by women in various areas, the revolution has given food for thought, for women to question the ways and methods of society and why they are the way they are, and to find out a possibility of their change. Various obstacles for feminist jurisprudence or growth of feminism are also mentioned and the impact of whatever effort has been made post-independence is also highlighted.

References:

1. Ellison v. Brady
2. General Electric Co. v. Gilbert
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